TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 36

THOMAS W. WHITE, FORMER COLLECTOR OF INTERNAL REVENUE, PETITIONER

vs.

MARY ADELAIDE POOR ET AL., SURVIVING EXECUTORS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 29, 1935
CERTIORARI GRANTED MAY 20, 1935

SUPREME COURT OF THE UNITED STATES

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1934.

No. 2980.

THOMAS W. WHITE,

Former Collector of Internal Revenue,

DEFENDANT, APPELLANT,

v.

MARY ADELAIDE POOR ET AL.,

Surviving Executors.

PLAINTIFFS, APPELLEES.

APPEAL FROM THE DISTRICT COURT O E UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS, FROM JUDGMENT (BREWSTER, J.), OCTOBER 25, 1934.

TRANSCRIPT OF RECORD.

FRANCIS J. W. FORD,
UNITED STATES ATTORNEY,

J. DUKE SMITH,
SPECIAL ASSISTANT TO THE U. S. ATTORNEY,
for Appellant.

EDWIN A. HOWES,
HUTCHINS & WHEELER,
for Appellee.

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1934.

No. 2980.

THOMAS W. WHITE, Former Collector,

DEFENDANT, APPELLANT,

v.

MARY ADELAIDE POOR ET AL.,

Surviving Executors.

PLAINTIFFS, APPELLEES.

TRANSCRIPT OF RECORD OF DISTRICT COURT.

No. 5625, Law Docket.

MARY ADELAIDE POOR AND GEORGE WINTHROP SARGENT,

Surviving Executors of the Will of Adelaide J. Sargent, Deceased,

Plaintiffs.

v.

THOMAS W. WHITE,

Former Collector of Internal Revenue,

Defendant.

The writ and declaration in this cause were filed in the clerk's office on the tenth day of July, A.D. 1933, and are in the words and figures following:

WRIT.

MASSACHUSETTS DISTRICT, ss.:

[L. S.]

The President of the United States of America,

To the Marshal of our District of Massachusetts, or his Deputy,

GREETING:

We command you to attach the goods or estate of Thomas W. White, Collector of Internal Revenue, of Newton in our District of Massachusetts, defendant, to the value of Five Thousand (5,000) Dollars, and summon the said defendant (if he may be found in your district), to appear before our Judge of our District Court, next to be holden at Boston, within and for our said District of Massachusetts, on the second Tuesday of September, 1933, then and there, in our said Court, to answer unto Mary Adelaide Poor of Cambridge and George Winthrop Sargent of Wellesley, both in said District of Massachusetts, surviving executors of the will of Adelaide J. Sargent, deceased, late of Boston in said District, plaintiffs, in an action of contract. To the damage of the said plaintiffs (as they say) the sum of Five Thousand Dollars, which shall then and there be made to appear, with other due damages. And have you there this Writ, with your doings therein.

WITNESS, The Honorable James A. Lowell, at Boston, the sixteenth day of June in the year of our Lord one thousand nine hundred and thirty-three.

JAMES S. ALLEN, Clerk,
by John E. Gilman, Jr., Deputy Clerk.

OFFICER'S RETURN ON WRIT.

UNITED STATES OF AMERICA
MASSACHUSETTS DISTRICT } ss: Boston, June 20, 1933.

Pursuant hereunto I have this day attached a chip as the

property of the within named Thomas W. White, and thereafter on the same day I summoned the within named Thomas W. White, to appear at Court as within directed, by giving to him in hand at Boston, in said district an original Summons to this writ.

WILLIAM J. KEVILLE, U. S. Marshal,
by Joseph M. Winston, Deputy.

DECLARATION.

[Filed July 10, 1933.]

Upon the filing of the writ and declaration herein, an order to plead was entered.

COUNT 1. The plaintiffs say that: They are the duly appointed surviving executors of the will of Adelaide J. Sargent. Said Adelaide J. Sargent died on January 22, 1931, a resident of Boston, Massachusetts, leaving a last will and testament. Said will was duly proved and allowed in the Probate Court of Suffolk County, Massachusetts, on February 19, 1931, and the plaintiffs together with Arthur H. Sargent were appointed and duly qualified as executors on February 19, 1931. Said Arthur H. Sargent died on March 20, 1932, and the plaintiffs since March 20, 1932, have been and now are the surviving executors of the will of said Adelaide J. Sargent.

On January 20, 1932, said executors duly filed with the Collector of Internal Revenue at Boston, Massachusetts, a Federal Estate Tax Return for the estate of said Adelaide J. Sargent, showing a gross estate of $53,384.37, allowable deductions amounting to $6,539.82, a specific exemption of $100,000 and no net estate. Said $53,384.37 was the correct value of all the property owned and possessed by said Adelaide J. Sargent at the time of her death, said deductions in the amount of $6,539.82 were allowable deductions to which the executors were entitled and said specific exemption of $100,000 was an allowable exemption to which said executors were entitled.

On a review and audit of said Estate Tax return the Com-

missioner of Internal Revenue, erroneously and without authority of law and against the protest of said executors, determined the value of the gross estate of said Adelaide J. Sargent to be $491,275.79, by adding to said value of the estate owned and possessed by her at the time of her death, $437,891.42 which represented the value of the property of the Sargent Trust, which trust was created by said Adelaide J. Sargent on December 31, 1919, by conveyance of certain real estate then owned by her, to herself and two other persons as trustees upon a trust set forth in a declaration of trust executed on December 31, 1919, by said three trustees. Said conveyance in trust by said Adelaide J. Sargent was not made in contemplation of death and was not a transfer to take effect in possession and enjoyment at or after the death of said Adelaide J. Sargent, but was a complete and unconditional transfer by her of all her right, title and interest in said property. No power to revoke, alter or amend said trust was given or reserved to said Adelaide J. Sargent. The only power to revoke, alter or amend said trust was a power given to the trustees for the time being to revoke said trust in whole or in part. Said Adelaide J. Sargent had no power to change the trustees or to designate new trustees in case of resignation or death of the original trustees. At all times prior to the death of said Adelaide J. Sargent, her son Arthur H. Sargent, who had a substantial beneficial interest under said trust, and Harry LeBaron Sampson, who had no beneficial interest, were two of the three trustees. Said Arthur H. Sargent's beneficial interest was at all times adverse to the termination or revocation of said trust and said Sampson was at all times unwilling to revoke said trust without the consent of all of the children of said Adelaide J. Sargent, all of whom were beneficially interested in said trust, and said children were at all times unwilling to consent to a revocation of said trust. Said power to revoke said trust was never exercised by said trustees and said trust was in full force and effect at the date of the death of said Adelaide J. Sargent.

The true value of said property of said Sargent Trust at the time of the death of said Adelaide J. Sargent was $437,891.42. On said review and audit of said estate tax return the Commissioner of Internal Revenue determined that said deductions in the amount of $6,539.82 were allowable deductions and that said exemption of $100,000. was an allowable exemption and against the protest of said executors determined that the value of the net estate of said Adelaide J. Sargent was $385,485.97 and assessed a deficiency estate tax in the amount of $2,377.89, stating as his reason therefor that the transfer of the Sargent Trust was taxable under and by virtue of the provisions of Section 302 (d) of the Revenue Act of 1926. Subsequent thereto under date of March 16, 1933, the plaintiffs received from the defendant a notice and demand for the payment of said $2,377.89 together with interest thereon in the amount of $155.57, said assessment and interest totaling $2,533.46.

On or about April 12, 1933, in consequence of and by compulsion of said notice and demand, the plaintiffs paid to the defendant as Collector of Internal Revenue said $2,533.46 under written protest expressly reserving the right to sue for and recover said amount together with interest thereon from the time of payment. Said payment was not made voluntarily, but was made under compulsion of said notice and demand and solely to avoid the pains and penalties for failure to pay.

On or about April 26, 1933, the plaintiffs duly filed with the Commission of Internal Revenue, a claim for refund of said payment of $2,533.46 stating as reasons therefor (1) that the Commissioner had erroneously included the value of the property of said Sargent Trust as part of the gross estate of said Adelaide J. Sargent and that the whole amount of the tax was due to such inclusion; (2) That under the provisions of the Revenue Act of 1926 as amended by the Revenue Act of 1928, the value of the property of said Sargent Trust ought not to have been included as part of the gross estate

of Adelaide J. Sargent and no part of said tax ought to have been assessed; (3) That the Revenue Act of 1926 as amended by the Revenue Act of 1928, if construed as requiring the property of the Sargent Trust or its value to be included in the gross estate of Adelaide J. Sargent, is, in that respect, in violation of the Constitution of the United States and the Amendments thereof, and is void.

Said claim for refund was rejected by the Commissioner of Internal Revenue and the plaintiffs received notice by letter signed by the Acting Commissioner of Internal Revenue under date of June 1, 1933, that said claim for refund was rejected in its entirety.

Wherefore the plaintiffs say that the entire amount of said deficiency assessment is due to the erroneous inclusion of the value of the property of said Sargent Trust as part of the gross estate of said Adelaide J. Sargent; that without said erroneous inclusion of the value of said trust property the gross estate of said Adelaide J. Sargent is less than the total of allowable deductions and the allowable specific exemption; that the Commissioner of Internal Revenue was in error in treating the value of the property of said Sargent Trust as a part of the gross estate of said Adelaide J. Sargent and in determining an estate tax on the basis of a gross estate determined by him as including the value of said trust property or any part thereof; that no estate tax was properly assessable upon them with respect to the estate of Adelaide J. Sargent; that under the law and the Constitution of the United States and Amendments thereof no estate tax could properly be assessed upon the plaintiffs with respect to the transfer of said trust property or any interest therein, or by reason of the death of said Adelaide J. Sargent; that the rejection of said claim for refund was error of law; that said tax was assessed upon the plaintiffs illegally and without authority of law and was collected from the plaintiffs by the defendant illegally, wrongfully and without authority of law,

and the defendant owes the plaintiffs $2,533.46 together with interest thereon from April 12, 1933.

HUTCHINS & WHEELER,
By their Attorneys,
HARRY LEBARON SAMPSON,
EDWIN A. HOWES.

On the 24th day of July, A.D. 1933, the following answer was filed:

ANSWER.

[Filed July 24, 1933.]

Now comes the defendant in the above-entitled action and for his answer to the declaration on file herein denies each and every material allegation, item, count and particular in said declaration contained.

By his Attorneys,
FREDERICK H. TARR,
United States Attorney,

By: J. DUKE SMITH,
Special Assistant to the United States Attorney.

This cause was thence continued to the September Term, A.D. 1933, when, to wit, December 1, 1933, the following waiver of jury was filed.

WAIVER OF JURY.

[Filed December 1, 1933.]

Now come the parties and waive trial by jury, by their attorneys.

HUTCHINS & WHEELER,
HARRY LEBARON SAMPSON,
EDWIN A. HOWES,
Attorneys for the Plaintiffs.
FRANCIS J. W. FORD,
United States Attorney.
By: J. DUKE SMITH,
Special Assistant to the United States Attorney.
Attorney for the Defendant.

This cause was thence continued to the December Term, A.D. 1933, when, to wit, January 3, 1934, the following statement of agreed facts was filed.

STATEMENT OF AGREED FACTS.

[Filed January 3, 1934.]

It is hereby stipulated and agreed, by and between the parties hereto by their respective attorneys, that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

1. The plaintiffs, Mary Adelaide Poor and George Winthrop Sargent, are the duly appointed surviving executors of the will of Adelaide J. Sargent, deceased, late of Boston, Massachusetts. Adelaide J. Sargent died on January 22, 1931. At the time of her death she was 93 years of age, a resident of Boston in the County of Suffolk, Commonwealth of Massachusetts, and was a citizen of the United States of America. The last will of Adelaide J. Sargent, dated April 25, 1930, was duly proved and allowed in the Probate Court of Suffolk County on February 19, 1931, and the plaintiffs, Mary

Adelaide Poor and George Winthrop Sargent, together with Arthur H. Sargent, were appointed and duly qualified as executors of her last will on February 19, 1931. A true and complete copy of the decedent's last will, marked Exhibit "A", is annexed hereto and made a part hereof, and may be used in evidence for all purposes for which the original will might properly be used. Arthur H. Sargent died on March 20, 1932, and since that date the plaintiffs, Mary Adelaide Poor and George Winthrop Sargent, have been, and they now are, the surviving executors of the last will of Adelaide J. Sargent.

2. On January 20, 1932, the executors duly filed with the Collector of Internal Revenue at Boston, Massachusetts, a Federal estate tax return for the estate of Adelaide J. Sargent. The return showed a gross estate of the value of $53,384.37, allowable deductions amounting to $6,539.82, a specific exemption of $100,000.00, and no net estate. On the return the executors set forth information relative to the terms of a conveyance in trust made by Adelaide J. Sargent on December 31, 1919, to herself, Arthur H. Sargent, who was her son, and Harry LeBaron Sampson, relative to the property held by the trustees under the trust at the date of the death of Adelaide J. Sargent and relative to the value of said trust property at said date. A true and complete copy of the return, marked Exhibit "B", is annexed hereto and made a part hereof, and may be used in evidence for all purposes for which the original return might properly be used.

3. The terms of the trust are as set forth in a declaration of trust executed on December 31, 1919. A true and complete copy of the declaration of trust, marked Exhibit "C", is annexed hereto and made a part hereof, and the terms and conditions of the trust as set forth in such copy and said Exhibit "C" may be used in evidence for all purposes for which the original declaration of trust might properly be used.

4. Most of the property included in the conveyance in trust came to Adelaide J. Sargent either directly from her husband, George D. Sargent, who died prior to the creation

of the trust, or from reinvestment of the proceeds of sales of property received from him. George D. Sargent was the father of the three children of Adelaide J. Sargent who are named in the declaration of trust as beneficiaries of said trust.

5. On a review and audit of the estate tax return the Commissioner of Internal Revenue, against the protest of the executors included as part of the gross estate of Adelaide J. Sargent the value of the trust property and determined the total value of the gross estate to be $491,275.79, instead of $53,384.37, returned by the executors. Deducting from the gross estate so determined the allowable personal exemption and deductions, the Commissioner determined the value of the net estate to be $384,735.97, determined the gross estate tax liability to be $11,889.44, and, after allowance of a credit of $9,511.55 for inheritance and estate taxes paid to the Commonwealth of Massachusetts, assessed a deficiency estate tax in the sum of $2,377.89. Copies of the Commissioner's determination of the Federal estate tax liability assessed against the estate of Adelaide J. Sargent and mailed to the plaintiffs on October 27, 1932, and February 23, 1933, respectively, marked Exhibits "D" and "E", are annexed hereto and made a part hereof, and said copies and Exhibits "D" and "E" may be used in evidence for all purposes for which the originals thereof might properly be used.

6. March 16, 1933, the plaintiffs received from the defendant a notice and demand for payment of the deficiency assessment of $2,377.89, together with interest thereon amounting to $155.57.

7. On April 12, 1933, the plaintiffs in pursuance of such notice and demand paid to the defendant as Collector of Internal Revenue the deficiency assessment and interest totaling $2,533.46, under written protest that the payment was not made voluntarily but under the compulsion of said notice and demand and to avoid the pains and penalties for failure to pay.

8. On April 26, 1933, the plaintiffs filed with the Commissioner of Internal Revenue a claim for refund of the payment of $2,533.46, stating as reasons therefor (1) that the Commissioner had erroneously included the value of the property of said Sargent Trust as part of the gross estate of said Adelaide J. Sargent and that the whole amount of the tax was due to such inclusion; (2) that under the provisions of the Revenue Act of 1926 as amended by the Revenue Act of 1928, the value of the property of said Sargent Trust ought not to have been included as part of the gross estate of Adelaide J. Sargent and no part of said tax ought to have been assessed; (3) that the Revenue Act of 1926, as amended by the Revenue Act of 1928, if construed as requiring the property of the Sargent Trust or its value to be included in the gross estate of Adelaide J. Sargent, is in that respect in violation of the Constitution of the United States and the Amendments thereof and is void. A copy of the claim for refund, marked Exhibit "F", is annexed hereto and made a part hereof, and said copy and Exhibit "F" may be used in evidence for all purposes for which the original thereof might properly be used.

9. The claim for refund was rejected in its entirety by the Commissioner of Internal Revenue on or about June 1, 1933, and the plaintiffs received notice, by letter signed by the Acting Commissioner of Internal Revenue under date of June 1, 1933, that said claim for refund was rejected in its entirety. A copy of the letter of June 1, 1933, marked Exhibit "G", is annexed hereto and made a part hereof, and said letter and Exhibit "G" may be used in evidence for all purposes for which the original thereof might properly be used.

10. The actual value of the gross estate of Adelaide J. Sargent at the date of her death, exclusive of the value of the property then held by the trustees under said Sargent Trust was $53,384.37, as returned by the executors and as determined by the Commissioner of Internal Revenue upon review and audit of the Estate Tax return, and the total of allowable

deductions from her gross estate, including the specific exemption of $100,000.00, amounted to $106,539.82, irrespective of whether or not the value of said trust property was or ought to have been included as part of her gross estate. The estate is entitled to a specific exemption of $100,000.00, irrespective of whether or not the value of said trust property was or ought to have been included as part of her gross estate.

HUTCHINS & WHEELER
HARRY LEBARON SAMPSON
EDWIN A. HOWES
Attorneys for the Plaintiffs.
FRANCIS J. W. FORD
United States Attorney.
By: J. DUKE SMITH,
Special Asst. to the U. S. Attorney
Attorney for defendant.

[MEMORANDUM. Copies of exhibits, the last will of decedent and copy of Federal estate tax return, marked respectively "A" and "B" are here omitted, by consent of counsel.

JAMES S. ALLEN, *Clerk.*]

EXHIBIT "C"

ANNEXED TO STATEMENT OF AGREED FACTS.

THE SARGENT TRUST.

THIS DECLARATION OF TRUST made this thirty-first day of December, A. D. 1919,

WITNESSETH:

THAT WHEREAS Adelaide J. Sargent of Hamilton in the County of Essex and Commonwealth of Massachusetts, has by deed of even date with this declaration of trust and to be recorded herewith, conveyed to the said Adelaide J. Sargent, Arthur Hewes Sargent of Boston in the County of Suffolk, and Harry LeBaron Sampson of Middleborough in the County of Plymouth, Trustees under this declaration of trust, cer-

tain parcels of real estate more specifically described in said deed,

NOW THEREFORE, We, the said Adelaide J. Sargent, Arthur Hewes Sargent and Harry LeBaron Sampson, do hereby declare that we hold the said property and any and all property that we may hereafter hold in place of or in substitution for or in addition to the property conveyed to us by said deed, in trust, to hold, manage, invest and reinvest the same as a trust fund, changing investments from time to time as we shall see fit, and after deducting all proper charges and expenses, including a reasonable compensation for our services, and also such amounts as we may deem reasonable to provide a reserve fund for repairs, taxes and other expenses that may be payable thereafter, to dispose of the same in the manner herein set forth, namely;

FIRST. The net income of said trust fund shall be disposed of as follows:

During the lifetime of the said Adelaide J. Sargent, one-half thereof shall be paid to her in semi-annual payments, or oftener if convenient, and the other half thereof and after the death of the said Adelaide J. Sargent the whole of said net income, shall be equally divided between such of the three children of the said Adelaide J. Sargent, to wit, the said Arthur Hewes Sargent, George Winthrop Sargent of Wellesley in the County of Norfolk, and Mary Adelaide Poor, wife of Clarence H. Poor, of Beverly, in the County of Essex, as shall be living at the time of such payment and the issue then living taking by right of representation of such of them as shall have died at the time of such payment, subject, however, to the following power of appointment: that any one of said children so dying may by his or her last will direct and appoint that the share of the income which but for his or her death would be paid to him or her, or any part thereof, shall be paid to any other person, and if such appointment be made the share of income or any part thereof shall be paid over in accordance therewith.

Upon the death of the last survivor of Adelaide J. Sargent and said children this trust shall terminate, and upon such termination the capital of said trust shall be divided into three equal shares, except as hereinafter provided, and one such share shall be paid over to such person or persons and for such uses and purposes as the said Arthur Hewes Sargent shall by his last will direct and appoint, and in default of such appointment shall be paid over to the issue of the said Arthur Hewes Sargent who shall be living at the time of the termination of this trust, such issue taking by right of representation, and in default of appointment and in default of such issue shall be divided among those persons who would be entitled to receive the same and in the proportions in which they would be entitled to receive it had the said Arthur Hewes Sargent then died intestate a resident of Massachusetts, seized and possessed of said property; and one such share shall be paid over to such person or persons and for such uses and purposes as the said George Winthrop Sargent shall by his last will direct and appoint, and in default of such appointment shall be paid over to the issue of the said George Winthrop Sargent who shall be living at the time of the termination of this trust, such issue taking by right of representation, and in default of appointment and in default of such issue shall be divided among those persons who would be entitled to receive the same and in the proportions in which they would be entitled to receive it had the said George Winthrop Sargent then died intestate a resident of Massachusetts, seized and possessed of said property; and the remaining share shall be paid over to such person or persons and for such uses and purposes as the said Mary Adelaide Poor shall by her last will direct and appoint, and in default of such appointment shall be paid over to the issue of the said Mary Adelaide Poor who shall be living at the time of the termination of this trust, such issue taking by right of representation, and in default of appointment and in default of such issue shall be divided among those persons who would be en-

titled to receive the same and in the proportions in which they would be entitled to receive it had the said Mary Adelaide Poor then died intestate a resident of Massachusetts, seized and possessed of said property.

If at any time the amount of income paid to any of said children from the trust fund shall not in the opinion of the trustees under this declaration of trust be sufficient for his or her comfortable support and maintenance and that of his or her family, the trustees may from the capital of the trust fund in their hands pay to him or her such sum of money as they shall see fit, but not to exceed in any year the sum of four thousand dollars ($4000) to any one child, and thereafter the interest of the child to whom such payment is made, his or her issue, and the legatees and appointees under his or her will, in the income of the said trust fund and in the principal thereof shall be diminished in such manner and to such extent as the trustees shall in their uncontrolled discretion determine.

SECOND. The trustees shall have the absolute control over and disposal of all property, real or personal, held by them at any time under this trust, as if they were the sole beneficial owners thereof, including but not hereby restricting the preceding generality, the power to sell for cash or credit, at public or private sale, free and discharged of all trusts, to pledge or mortgage the trust property, with or without power of sale (and no pledgee, purchaser or mortgagee shall be liable to see to the application of the money paid or lent to the trustees). They shall also have the power to borrow money for the purposes of the trust, and give notes therefor binding the assets of the trust but not the trustees personally, and no lender of money to said trustees shall be liable in any way for the application of the money lent. The trustees may make party wall or other contracts or agreements in relation to the trust estate and may make leases of the trust property for such terms as said trustees may deem expedient irrespective of the duration of the trust and all persons receiving

said property under the provisions hereof shall take the same subject to such leases or agreements. Said trustees may repair, alter or rebuild the structures on the property held hereunder or erect new buildings thereon, and may invest the proceeds of property sold, or the proceeds of mortgage loans in other real or personal property to be held upon the trusts hereof.

In case of the absence from the United States of any trustee hereunder the other two trustees may exercise all the powers herein given to the trustees and perform all their duties, and the trustee so absent shall not be liable for the acts or omissions of his co-trustees during the period of such absence or for any losses arising therefrom, and the certificate of the other two trustees as to such absence, when signed, sealed and acknowledged by him or them and duly recorded in the Registry of Deeds for Suffolk County, shall be conclusive.

THIRD. No bond shall be required of any trustee under this declaration of trust, and each trustee shall be responsible only for his own acts and defaults and not for the acts and defaults of any other, and no trustee shall be liable for any banker or broker or agent by him employed, and in the investment of the trust funds they shall have full and uncontrolled discretion and shall not be responsible for any losses incurred by reason of their investments, and they shall not be liable for any diminution in value or loss of any part of the trust fund unless occasioned by their gross neglect or wilful default.

FOURTH. Whenever in the execution of the trusts under this declaration of trust it shall be necessary to separate any part of the capital from the remainder thereof, or to distribute the whole or any part of the capital of said trust fund, the trustees shall have power to make a valuation of the whole capital of the trust fund then existing and select such and so much thereof as in their opinion would be just and equitable as the share of the person to whom any part

thereof is to be paid or distributed, and in making such valuation and selection the decision of the trustees shall be final and binding upon the parties.

FIFTH. The trustees are authorized to pay over any and all dividends, interest and income of the said trust fund to the various beneficiaries at their discretion without regard to the question whether the same are derived from wasting investments or not and without making any reserve therefrom for the purpose of making good to the capital the amount paid in premiums on bonds purchased or the excess above their par value at which such securities may be at any time valued.

SIXTH. The interest of the beneficiaries under this declaration of trust shall be free from anticipation, alienation, assignment or pledge by them and free from attachment or control by their creditors by any proceedings at law or in equity.

SEVENTH. In case of the death, resignation or inability to act of any of the trustees under this declaration of trust, a successor shall be appointed by the surviving trustee or trustees by a written instrument duly signed, sealed and acknowledged by them or him and approved by the then living children of said Adelaide J. Sargent and duly recorded in the Registry of Deeds for the County of Suffolk, and if no such appointment shall be made within ninety days after such death, resignation or inability to act of any of said trustees, then by a Judge of Probate for the County of Suffolk and Commonwealth of Massachusetts upon the application of any person interested hereunder, subject, however, to this provision: that there shall be at all times one trustee under this declaration of trust who shall not be related either by blood or marriage to any of the beneficiaries hereunder. Until the appointment of a succeeding trustee or trustees the surviving or continuing trustee or trustees shall have all the rights and powers given to the trustees hereunder, and in case of the appointment of a succeeding trustee or trustees

the person or persons so appointed shall have the like duties, power and discretion as are herein given or imposed upon the trustees herein appointed.

EIGHTH. This trust may be terminated at any time either as to the whole or as to any part of the property held in trust hereunder, by the person or persons who shall then be trustees hereunder, such termination to be evidenced by a written declaration signed, sealed and acknowledged by them and duly recorded in the Registry of Deeds for the County of Suffolk, setting forth specifically the property as to which such termination is to take effect, and in that event the trusts declared hereunder shall as to such property be at an end and such property shall be paid over and conveyed, free and discharged of all trusts, to the said Adelaide J. Sargent, if she be then living, and if she be not then living one share shall be paid over and conveyed to each of her children who shall then be living, and a like share shall be paid over and conveyed to the appointees by will of each of her children who shall then have died making such appointment, or failing such appointment, to the issue of such deceased child then living, such issue taking by right of representation.

NINTH. The certificate of the remaining trustees as to the death or inability to act of any trustee hereunder and of the trustees for the time being as to the relationship of any person by blood or marriage to any of the beneficiaries and as to any other facts or matters in any way relating to the trust, when signed, sealed and acknowledged by them and duly recorded in the Registry of Deeds for the County of Suffolk, shall be conclusive as to all facts stated in such certificate.

IN WITNESS WHEREOF we, said Adelaide J. Sargent, Arthur Hewes Sargent and Harry LeBaron Sampson, have

hereunto set our hands and seals the day and year first above written.

ADELAIDE J. SARGENT (seal)
ARTHUR H. SARGENT "
HARRY LEBARON SAMPSON "

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. December 31st. 1919.

Then personally appeared the above-named Adelaide J. Sargent and Harry LeBaron Sampson and acknowledged the foregoing instrument to be their free act and deed, before me,

WALTER L. VAN KLEECK
Justice of the Peace

My commission expires April 2, 1920.

EXHIBIT "D"

ANNEXED TO STATEMENT OF AGREED FACTS.

Oct 27 1932

MT-ET-C1-9452-LO
District of Massachusetts
Estate of Adelaide J. Sargent
Date of death—January 22, 1931

Assess Dtf. Tax $2377.89
Assess Int. 6% from 1/22/32 to d/a
By VD Date 2/10/33
Page..... Line..... List.....

George Winthrop Sargent, et al., Executors,
Estate of Adelaide J. Sargent,
c/o Hutchins & Wheeler,
49 Federal Street,
Boston, Massachusetts.

Sirs:

The Bureau has examined the protest filed on behalf of the above-named estate against the tentative findings set forth in the letter addressed to the executor by this office under date of June 4, 1932. The deficiency in Federal estate tax hereby determined amounts to $9,908.54, and is fully explained in the attached statement, consisting of two pages, showing the action of the Bureau with respect to the protest.

In accordance with the provisions of Title III of the Revenue Act of 1926, you are allowed 60 days from the date of the mailing of this letter (not counting Sunday as the sixtieth day) within which to file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Washington, D. C., and must be mailed in time to reach the said Board within the 60-day period prescribed.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed, and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the decision, which has become final, has been made, the unpaid amount of such assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute the enclosed Form 890, (1) waiving the restrictions on the assessment and collection of such deficiency and (2) consenting to the assessment and collection thereof, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of the Estate Tax Division, Miscellaneous Tax Unit. In the event that you acquiesce in only a part of the determination, the enclosed form

of waiver should be executed with respect to the amount of the deficiency to which you agree.

Respectfully,

DAVID BURNET, Commissioner.

By: R. M. ESTES,
Deputy Commissioner.

Enclosures:
Statement.
Waiver – Form 890.
HTD
LO WJH
MT-ET-C1-9452-LO-Massachusetts
Estate of Adelaide J. Sargent

The protest relates to the following items:

	Returned	Tentatively Determined	Determined
GROSS ESTATE			
Transfers			
Property transferred under trust agreement dated December 31, 1919	$ 0.00	$437,891.42	$437,891.42
DEDUCTIONS			
Attorneys' fees	$ 750.00	$ 0.00	$ 750.00

It is contended by the estate that the inclusion of trust property of the Sargent Trust as part of the gross estate of the decedent is contrary to the principles laid down by the Supreme Court in certain cases which are cited and is squarely in conflict with the decision of the Circuit Court of Appeals for the First Circuit in the case of White v. Erskine.

After careful consideration of these citations in their relation to the transfer in the instant case, the Bureau is of the opinion that the transfer of the Sargent Trust is taxable under and by virtue of the provisions of Section 302 (d) of the Revenue Act of 1926.

Under "Attorneys' Fees", deduction is made in the amount

which will be paid as disclosed by evidence submitted in support of the protest.

In view of the foregoing, the following computation shows the estate tax liability of this estate, which is hereby made final:

Gross estate	$ 53,384.37	$491,275.79	$491,275.79
Deductions	106,539.82	105,789.82	106,539.82
Net estate	$ 0.00	$385,485.97	$384,735.97
Gross tax	$ 0.00	$ 11,919.44	$ 11,889.44 ✓
Credit for State estate, inheritance, legacy or succession taxes paid	0.00	0.00	1,980.90 ✓
Net tax	$ 0.00	$ 11,919.44	$ 9,908.54 ✓
Deficiency			$ 9,908.54

Credit is allowed in the amount of estate, inheritance, legacy, or succession taxes paid to the State of Massachusetts, being "$669.34 on estate" and "$1,311.56 on declaration of trust."

MT-ET-C1-9452-LO-Massachusetts
Estate of Adelaide J. Sargent

Upon receipt of a waiver or upon the expiration of sixty days from the date of this letter if a petition is not filed with the Board of Tax Appeals, $2,377.89 of the deficiency will be assessed. As the balance of the deficiency may be eliminated by credit for State or Territorial estate, inheritance, legacy, or succession taxes, opportunity will be accorded for the submission of the evidence required by Article 9 of the Estate Tax Regulations. If, after a reasonable time, the evidence is not filed, the balance of the deficiency will be assessed. Please advise when the submission of this evidence may be expected. The deficiency bears interest at the rate of six per cent per annum from one year after the decedent's death to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

EXHIBIT "E"

ANNEXED TO STATEMENT OF AGREED FACTS.

Feb 23 '33

MT-ET-C1-9452-RB
District of Massachusetts
Estate of Adelaide J. Sargent
Date of death—January 22, 1931
George Winthrop Sargent, et al., Executors,
Estate of Adelaide J. Sargent,
c/o Hutchins & Wheeler, Attorneys,
49 Federal Street,
Boston, Massachusetts.

Sirs:

Reference is made to Bureau letter addressed to you under date of October 27, 1932, indicating a deficiency of $9,908.54 in connection with the above-named estate.

Since the mailing of the letter the estate has submitted the evidence required under Article 9 of Regulations 70 (1929 Edition) which entitles it to credit in the amount allowed as indicated in the following tabulation:

Gross tax determined	$ 11,889.44
Credit for State estate, inheritance, legacy or succession taxes paid	9,511.55
Net tax determined	$ 2,377.89

Inasmuch as the tax due has been assessed, the records of the Bureau pertaining to the case will be closed upon receipt of notice from the Collector that full payment of all tax and interest has been made.

Respectfully,
DAVID BURNET, Commissioner.
By: R. M. ESTES,
Deputy Commissioner.

LM

EXHIBITS "F" & "G"

ANNEXED TO STATEMENT OF AGREED FACTS.

Form 843
Treasury Department
Internal Revenue Service
Revised June, 1930

#1289 Posted

CLAIM

To be filed with the Collector where assessment was made or tax paid.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☐ Refund of Tax Illegally Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate or income taxes)

Collector's Stamp
(Date received)
Apr 26 1933
District of Mass.
Estate Tax Division

State of Massachusetts } ss:
County of Suffolk }

TYPE OR PRINT

Name of taxpayer or purchaser of stamps Mary Adelaide Poor and George Winthrop Sargent, Surviving Executors of the will of Adelaide J. Sargent,

Business address c/o Hutchins & Wheeler, 49 Federal St. Boston, Mass.

Residence Cambridge and Wellesley, Mass.

The deponents, being duly sworn according to law, depose and say that this statement is made on behalf of the taxpayers named, and that the facts given below are true and complete:

1. District in which return (if any) was filed Massachusetts

2. Period (if for income tax, make separate form for each taxable year) from ....., 19...., to ....., 19....

3. Character of assessment or tax Estate Tax deficiency assessment

4. Amount of assessment, $2533.46; dates of payment April 11, 1933

5. Date stamps were purchased from the Government

6. Amount to be refunded $2,533.46

7. Amount to be abated (not applicable to income or estate taxes) $

8. The time within which this claim may be legally filed expires, under Section 319 (b) of the Revenue Act of 1926, on April 11th, 1936.

The deponent verily believes that this claim should be allowed for the following reasons:

by GEORGE WINTHROP SARGENT
by MARY ADELAIDE POOR

Signed GEORGE WINTHROP SARGENT
MARY ADELAIDE POOR
Surviving Executors of the will
of Adelaide J. Sargent.

Sworn to and subscribed before me this 24th day of April, 1933

G. S. HOWARD,
Notary Public
K1

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

Character of assessment and period covered, Estate Tax; List, F23a; Year, 1933; Month, Feb.; Account No. or page 102, Line 1; Amount assessed, $2533.46; Paid, Abated, or Credited—Date, 4/11/33, Amount, $2533.46; Pd. Ab. Cr.—Pd.

Total amount assessed, $2533.46; total Paid, $2533.46.

P. M. WHITE,
Collector of Internal Revenue.
(District) Mass.

Claim examined by—
AMB
Claim approved by—
[Name illegible], Chief of Division.
5/26/33

COMMITTEE ON CLAIMS

Amount claimed $2533.46
Amount allowed
Amount rejected $2533.46

INSTRUCTIONS

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.

3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a state-

ment is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

K2

1. Because in determining the amount of gross and net estate for the purpose of the Federal Estate Tax, the Commissioner of Internal Revenue has erroneously included the value of the property of the Sargent Trust as part of the gross estate of Adelaide J. Sargent, and the whole amount of the tax is due to such inclusion.

2. Because under the provisions of the Revenue Act of 1926 as amended by the Revenue Act of 1928, the value of the property of the Sargent Trust should not have been included as a part of the gross estate of Adelaide J. Sargent and no part of said tax should have been assessed.

3. Because the Revenue Act of 1926 as amended by the Revenue Act of 1928, if construed as requiring the property of the Sargent Trust or its value to be included in the gross estate of Adelaide J. Sargent, is, in that respect, in violation of the Constitution of the United States and the Amendments thereof, and is void.

The terms of the Sargent Trust and a more detailed statement of the reasons for the allowance of this claim are set forth in the statement hereto annexed and made a part hereof.

STATEMENT OF TERMS OF THE SARGENT TRUST AND REASONS FOR CLAIM FOR REFUND OF TAX.

The said Sargent Trust was created by said Adelaide J. Sargent on December 31, 1919. By its terms the trust property which was conveyed by her to the trustees was to be held in trust during the joint lives of herself and her three children, Arthur H. Sargent, George Winthrop Sargent and Mary

Adelaide Poor, and the life of the survivor. During the life of said Adelaide J. Sargent one-half of the income was to be paid to her and one-sixth was to be paid to each of her three children and their respective issue or appointees by their respective wills. After the death of said Adelaide one-third of the income is to be paid to each of her children and their respective issue or appointees. On the death of the last survivor of said Adelaide and her three children the trust is to terminate and the principal is then to be divided among the issue or appointees of the three children. The three trustees were originally as follows: Adelaide J. Sargent, Arthur Hewes Sargent, who was a son of Adelaide and was entitled to a share of the income and had a power to appoint his share of the income and a share of the principal of the trust, and Harry LeBaron Sampson, who is not related to said Adelaide and has no beneficial interest in either the income or principal of the trust.

No power to revoke or change the trust was reserved to Adelaide J. Sargent as donor. The trustees under the trust for the time being were given the right to terminate the trust as to the whole or any part of the trust property, such termination to be effected only by a written declaration signed by all the persons who are trustees at the time of such termination. Adelaide J. Sargent retained no power to change the trustees or to designate new trustees. In the event of the death or resignation of a trustee a successor was to be appointed by the surviving or remaining trustees or trustee with the approval of the then living children of Adelaide. Adelaide's approval of the appointment of such new trustee was not required.

Adelaide J. Sargent was a trustee from the beginning of the trust until November 9, 1920, when she resigned. Her daughter Mary Adelaide Poor, one of the beneficiaries, was then appointed trustee and served until November 9, 1921, when she resigned. Adelaide J. Sargent was then reappointed, with the approval of the three children, to fill the

vacancy and thereafter served as one of the trustees until her death on January 22, 1931. Arthur H. Sargent, who was one of the beneficiaries, and Harry LeBaron Sampson were the other two trustees from the beginning of the trust until after the date of Adelaide's death. Adelaide J. Sargent at times expressed dissatisfaction with the trust and a desire to terminate it, but the other trustees were at all times unwilling to terminate and no such termination took place.

The property included in the trust had come to Adelaide from her husband, George D. Sargent, who died prior to the creation of the trust. He was the father of the three other beneficiaries.

The executors of the will of Adelaide J. Sargent filed an estate tax return showing a gross estate of $53,384.37, deductions amounting to $106,539.82, no net estate and no tax. This return gave full information as to the Sargent Trust, but did not include the value of the trust property in the gross estate of the decedent.

The Commissioner of Internal Revenue determined that the value of the Sargent Trust property as above stated, namely, $437,891.42, was taxable as part of the estate of Adelaide J. Sargent and included said amount in the decedent's gross estate, stating in his tentative determination as the reason for such inclusion "that the trust was subject to termination with the consent of less than all of the beneficiaries." Under date of February 23, 1933, the Commissioner of Internal Revenue notified the executors of his final determination of a net tax in the amount of $2,377.89 based upon a gross estate of $491,275.79 which included the said value of the trust property. Under date of March 16, 1933, notice and demand for payment of said $2,377.89 together with $155.57 of interest was sent by the Collector of Internal Revenue at Boston, Massachusetts, to the executors. On April 11, 1933, the surviving executors paid said assessment to the said Collector of Internal Revenue under written protest.

The surviving executors contend that the inclusion of the

value of trust property of the Sargent Trust as part of the gross estate of the decedent and the consequent assessment of said deficiency tax is contrary to the principles laid down by the Supreme Court of the United States in construction of Section 302 (c) of the Revenue Acts of 1924 and of 1926, in *Reinecke* v. *Northern Trust Co.*, 278 U.S. 339; *May* v. *Heiner*, 281 U.S. 238; *Burnet* v. *Northern Trust Co.*, 283 U.S. 782; *McCormick* v. *Burnet*, 283 U.S. 784, and is squarely in conflict with the decision of the Circuit Court of Appeals for the First Circuit, in *White* v. *Erskine*, 47 Fed. (2d) 1014, in which case the Court ruled that, "It is only 'to the extent of the interest' of the decedent in the trust fund, and at his death, that subdivision (d) adds anything to the value of the gross estate," and that a power over the trust fund which the decedent could not exercise for her own benefit or for the benefit of her estate except with the consent of an adverse party such as one of the beneficiaries, or, as in the case then before the Court, with consent of the trustee was not an interest in the trust which added anything to the value of her gross estate.

The facts of *White* v. *Erskine* are closely paralleled by the facts relating to the Sargent Trust, a complete copy of which was filed with the Estate Tax return. The decedent's beneficial interest in the trust was merely the right to one-half the net income which accrued during her lifetime. This was all that was given or reserved to her at the creation of the trust.

The decedent's power as trustee, acting in conjunction with the other trustees, to terminate the trust during her lifetime, like the power of the settlor in *Erskine* v. *White*, was not, and could be, converted by her into a beneficial interest in the trust property because she could not exercise the power except by consent of the two other trustees one of whom was adversely interested both as trustee and as beneficiary and the other as trustee representing all the beneficiaries and therefore bound to take into consideration the interests of those beneficiaries who would have been damaged by a revocation

of the trust prior to Mrs. Sargent's death. In *Reinecke* v. *Northern Trust Co.*, 278 U.S. 339, referring to a similar power the Supreme Court of the United States said, "Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust for all practical purposes, had passed as completely from any control by the decedent which might inure to his own benefit as if the gift had been absolute."

The executors contend further that if and in so far as the Revenue Act of 1926 purports to confer authority upon the Commissioner of Internal Revenue to include the value of the property of the Sargent Trust in the gross estate of this decedent for the purposes of determining an estate tax with respect to the passing of her estate or the cessation of any power to make the trust property part of her estate it is unconstitutional and void and the collection of a tax so determined is a taking of property without due process of law.

cc – Harry LeBaron Sampson, Attorney,
49 Federal Street,
Boston, Massachusetts.

MT-ET-C1-9452-AWW
District of Massachusetts
Estate of Adelaide J. Sargent
Date of death—January 22, 1931

Jun 1 1933

George Winthrop Sargent, et al., Executors,
Estate of Adelaide J. Sargent,
c/o Hutchins and Wheeler,
49 Federal Street,
Boston, Massachusetts.

Sirs:

The Bureau has examined the claim filed by you on April 26, 1932, for the refund of $2,533.46, Federal estate tax paid under the Revenue Act of 1926. The claim is based on the contention that the value of the property transferred by the

decedent under a trust agreement dated December 31, 1919, should be excluded from his gross estate, and also that its inclusion for tax is unconstitutional and void.

Certain cases are cited in support of such contention. The powers reserved to the decedent in the case of White v. Erskine cited by you, were much more limited than in the case now under consideration, and much, if not all, of the reasoning has been overruled in subsequent decisions. The Bureau rules that the power reserved in the trustees, of whom decedent was one at the date of her death, brings this case under Section 302 (d) of the Revenue Act of 1926. In this connection, your attention is called to the decisions of the United States Supreme Court in Porter v. Commissioner, decided March 13, 1933, and Reinecke v. Smith, decided April 11, 1933, also to the decision of the United States Court of Claims in the case of Hoblitzelle v. United States, decided on May 16, 1933.

Therefore, without decision as to whether the trust comes under any other provision of the statute, it is held that the value of the property covered by this trust was properly included in the gross estate. As to the constitutional question raised by you, the function of the Bureau is to administer the Internal Revenue Acts, and all constitutional questions must be determined by the court.

– 2 –

MT-ET-C1-9452-AWW-Massachusetts
Estate of Adelaide J. Sargent

In view of the foregoing, the claim for refund of $2,533.46 is rejected in its entirety.

Respectfully,

C R Beldridge
Acting Commissioner

At the same term, to wit, January 12, 1934, the following supplemental stipulation as to facts was filed:

SUPPLEMENTAL STIPULATION AS TO FACTS.

[Filed January 12, 1934.]

It is hereby agreed by the parties hereto that the three orig-

inal trustees were said Adelaide J. Sargent, Arthur H. Sargent, who was a son of said Adelaide, and was one of the beneficiaries, and Harry LeBaron Sampson, who had no beneficial interest in the trust property. The only changes which occurred in the personnel of the trustees prior to the death of said Adelaide J. Sargent were her resignation as trustee on November 9, 1920, the appointment in the manner provided for in the trust instrument, of her daughter, Mary Adelaide Poor, also one of the beneficiaries, to fill the vacancy, the resignation of said Mary Adelaide Poor on November 9, 1921, and the appointment, in the manner provided for in the trust instrument, of said Adelaide J. Sargent as trustee on said date. Said Arthur H. Sargent and Harry LeBaron Sampson continued as trustees throughout the whole of the period from the beginning of the trust until after the death of Adelaide J. Sargent. Said Adelaide J. Sargent was one of the trustees at her death. Said trust has never been terminated either in whole or in part. The value of the property held by the trustees of said trust was $437,891.42 at the date of said Adelaide J. Sargent's death.

HUTCHINS & WHEELER,
EDWIN S. HOWES,
Attorneys for the Plaintiffs.
FRANCIS J. W. FORD,
United States Attorney.
By: J. DUKE SMITH,
Special Assistant to the United States Attorney.
Attorneys for Defendant.

Also on the said 12th day of January, A.D. 1934, the following requests for rulings were filed by the plaintiffs and defendant:

DEFENDANT'S REQUESTS FOR RULINGS.

[Filed January 12, 1934.]

Now comes the defendant in the above-entitled action and requests that the Court find as matters of law:

(1) That the burden of proof is on the plaintiffs to show that the value of the property in question was improperly included in the defendant's gross estate;

(2) That the value of the property in question was properly included in the decedent's gross estate under the provisions of Sections 302 (c), (d), (h), of the Revenue Act of 1926.

By his Attorneys,

FRANCIS J. W. FORD,

United States Attorney.

By: J. DUKE SMITH,

Special Assistant to the United States Attorney.

PLAINTIFFS' REQUESTS FOR RULINGS.

[Filed January 12, 1934.]

The plaintiffs request the following findings and rulings of law:

1. The conveyance in trust made by Adelaide J. Sargent on December 31, 1919, to herself, Arthur H. Sargent and Harry LeBaron Sampson, as trustees of the Sargent Trust, was not made by her in contemplation of her death within the meaning of Section 402 (c) of the War Revenue Act of 1918, or within the meaning of Section 302 (c) of the Revenue Act of 1926.

2. The evidence does not warrant a finding that the conveyance in trust made by Adelaide J. Sargent on December 31, 1919, to herself, Arthur H. Sargent and Harry LeBaron Sampson, as trustees of the Sargent trust was made by said Adelaide J. Sargent in contemplation of her death within the meaning of Section 402 (c) of the War Revenue Act of 1918 or within the meaning of Section 302 (c) of the Revenue Act of 1926.

3. The conveyance in trust made by Adelaide J. Sargent on December 31, 1919, to herself, Arthur H. Sargent and Harry LeBaron Sampson, as trustees of the Sargent Trust, was not intended to take effect in possession or enjoyment at or after the death of said Adelaide J. Sargent within the meaning of

Section 402 (c) of the War Revenue Act of 1918 or within the meaning of Section 302 (c) of the Revenue Act of 1926.

4. The conveyance in trust made by Adelaide J. Sargent on December 31, 1919, to herself, Arthur H. Sargent and Harry LeBaron Sampson, as trustees of the Sargent Trust, was a conveyance and unconditional transfer by said Adelaide J. Sargent to herself and the other two trustees of all her right, title and interest in the property of the trust set forth in the declaration of trust dated December 31, 1919.

5. The rights of the beneficiaries of the Sargent Trust other than Adelaide J. Sargent, to one-half the net income of the trust until the death of Adelaide J. Sargent and of the whole of the net income after her death, and their rights to the corpus of the trust property after the death of the last survivor of the named beneficiaries, were completely vested by the transfer in trust made by her on December 31, 1919.

6. The provision of Article Eighth of the Sargent Trust reading: "This trust may be terminated at any time either as to the whole or as to any part of the property held in trust hereunder by the person or persons who shall then be trustees hereunder" and the accompanying provisions as to disposal of the property in case of such termination, did not reserve to or vest in Adelaide J. Sargent any such power or control over the trustees or over the property of the trust as to make the provisions of subdivisions (a) and (c) of Section 402 of the War Revenue Act of 1918 and Section 302 of the Revenue Act of 1926 applicable to the property of the trust or to the transfer.

7. The provision of Article Eighth of the Sargent Trust reading: "This trust may be terminated at any time either as to the whole or as to any part of the property held in trust hereunder by the person or persons who shall then be trustees hereunder," and the accompanying provisions as to disposal of the property in case of such termination did not give to Adelaide J. Sargent any such power or control over the trustees or the property of the trust as to bring the property or,

the transfer of it within the provisions of subdivision (d) of Section 302 of the Revenue Act of 1926.

8. If subdivision (d) of Section 302 of the Revenue Act of 1926 can be construed as applying in terms to the Sargent Trust, the value of the property of the Sargent Trust cannot properly be included in the gross estate of Adelaide J. Sargent.

9. The effect of including the value of the property of the Sargent Trust in the decedent's gross estate as defined by Section 302 of the Revenue Act of 1926 and the imposition of an Estate Tax upon a net estate resulting from such inclusion would be to impose an excise tax upon a transfer by a statute enacted after the transfer was completed and the collection of a tax based upon such inclusion of the value of the property of the Sargent Trust in the gross estate of the decedent was a taking of property without due process of law and in violation of the provisions of the Fifth Amendment to the Constitution of the United States.

10. The Commissioner of Internal Revenue was in error in including any part of the property of the Sargent Trust in the gross estate of Adelaide J. Sargent and in imposing an estate tax upon the executors of the will of Adelaide J. Sargent and was in error in denying their application for refund of said tax together with interest thereon and the collection of said tax by the Collector of Internal Revenue was without right.

HUTCHINS & WHEELER,
EDWIN A. HOWES.

Thereupon, to wit, January 12, 1934, said cause was set down for hearing on the statement of agreed facts and the supplemental stipulation as to facts, the Honorable Elisha H. Brewster, District Judge, sitting.

On the said 12th day of January, A.D. 1934, the following motion for entry of judgment was filed by the defendant:

DEFENDANT'S MOTION FOR JUDGMENT.

[Filed January 12, 1934.]

Now comes the defendant in the above-entitled action and on the pleadings and the evidence in the above-entitled case moves that judgment be entered for the defendant and against the plaintiffs with costs.

By his Attorneys,

FRANCIS J. W. FORD,

United States Attorney.

By: J. DUKE SMITH,

Special Assistant to the United States Attorney.

This cause was thence continued under advisement from term to term, when, to wit, August 7, 1934, said cause came on for further hearing, and it was ordered by the court that the defendant's requests for ruling be denied, the plaintiffs' requests for ruling be granted and the defendant's motion for judgment be denied, defendant's exceptions being saved.

On the said 7th day of August, 1934, an opinion of the court was announced, finding that the plaintiffs are entitled to recover the deficiency tax of $2533.46, unlawfully exacted, together with interest thereon, and it was ordered that judgment be entered accordingly.

Said cause was thence continued to the present September Term, A.D. 1934, when to wit, September 14, 1934, a draft bill of exceptions is filed by the defendant.

On the 25th day of October, A.D. 1934, a substituted bill of exceptions is filed by the defendant and allowed by the court.

Also on the said 25th day of October, the following plaintiffs' motion for entry of judgment is filed and allowed:

PLAINTIFF'S MOTION FOR JUDGMENT FORTHWITH.

[Filed and Allowed October 25, 1934.]

Now comes the plaintiffs in the above entitled action, after allowance of the defendant's bill of exceptions, and move that judgment for the plaintiffs be entered forthwith in the sum

of $2,533.46 together with interest thereon according to law from April 12, 1933 and costs.

By their Attorneys,
HUTCHINS & WHEELER,
EDWIN A. HOWES,

Oct. 25, 1934.
Allowed: S. H. B.,
D. J.

Thereupon to wit, October 25, 1934, it is considered by the Court, on the finding of the court, the Honorable Elisha H. Brewster, District Judge, sitting, that the said Mary Adelaide Poor and George Winthrop Sargent, Executors, plaintiffs, recover of the said Thomas W. White, former Collector of Internal Revenue, defendant, the sum of two thousand five hundred thirty-three dollars and forty-six cents ($2533.46) damages, together with interest according to law from April 12, 1933, and their costs of suit taxed at.....

DEFENDANT'S SUBSTITUTE BILL OF EXCEPTIONS.

[Filed and Allowed October 25, 1934.]

This is an action at law by Mary Adelaide Poor and George Winthrop Sargent, surviving executors under the will of Adelaide J. Sargent, deceased, against Thomas W. White, former Collector of Internal Revenue for the District of Massachusetts to recover Federal estate taxes alleged to have been erroneously and illegally assessed and collected in the amount of $2,533.46 with interest from April 12, 1933. The pleadings and the written opinion of the District Court are a part of this record and may be referred to as part of this bill of exceptions. Trial by jury was waived by an agreement in writing signed by the parties. The case was tried before Brewster J. on January 10, 1934 on the pleadings, Statement of Agreed Facts, a supplemental stipulation and other evidence. The said Statement of Agreed Facts with Exhibits annexed thereto and said supplemental stipulation

are incorporated into and made a part of this bill of exceptions by reference. The other evidence, which consisted in part of oral testimony of witnesses and in part of written documents, so far as material to the questions raised by these exceptions was to the effect:—that in 1907 the decedent had conveyed substantially the same property in trust for the benefit of herself and her three children reserving a power of revocation; that this prior trust had been revoked in 1911 and another trust had been then created for the benefit of herself and her three children with a power of revocation reserved to herself, which trust also was revoked in 1919 at the time of creation of the trust which existed at the time of her death and which was created to take the place of the 1911 trust; that the purpose of the 1919 trust, which is the trust involved in this suit, was to more definitely fix the shares of the beneficiaries, to join as a trustee a person of independent judgment who was not a member of the family and not beneficially interested in the trust, and to eliminate the power of revocation which the decedent had under the former trust; that Harry LeBaron Sampson was made a trustee by the decedent with the approval of the decedent's three children; that he was unwilling to join in the exercise of the power to terminate the trust unless requested to do so by all the children of Mrs. Sargent; and that Arthur H. Sargent who was one of the three trustees and was also a beneficiary was in this country for two or three months at a time, sometimes for six or seven months, and the remainder of the time he was abroad. He was within the United States at the time of the decedent's death and for some months prior thereto. There was other evidence on the question of contemplation of death which is not herein set forth for the reason that the question whether or not the conveyance was in contemplation of death is not raised by this bill of exceptions. The above constitutes all the facts material to the issue raised by this bill of exceptions.

At the trial the defendant requested the court to find as matters of law the following:

(1) That the burden of proof is on the plaintiffs to show that the value of the property in question was improperly included in the defendant's gross estate;

(2) That the value of the property in question was properly included in the decedent's gross estate under the provisions of Sections 302 (c), (d), (h), of the Revenue Act of 1926.

At the trial the defendant filed the following written motion for judgment:

Now comes the defendant in the above-entitled action and on the pleadings and the evidence in the above-entitled case moves that judgment be entered for the defendant and against the plaintiffs with costs.

At the trial the plaintiffs filed, among others, the following requests for findings and rulings:

. . . . . .

4. The conveyance in trust made by Adelaide J. Sargent on December 31, 1919, to herself, Arthur H. Sargent and Harry LeBaron Sampson, as trustees of the Sargent Trust, was a conveyance and unconditional transfer by said Adelaide J. Sargent to herself and the other two trustees of all her right, title and interest in the property of the trust set forth in the declaration of trust dated December 31, 1919.

5. The rights of the beneficiaries of the Sargent Trust other than Adelaide J. Sargent, to one-half the net income of the trust until the death of Adelaide J. Sargent and of the whole of the net income after her death, and their rights to the corpus of the trust property after the death of the last survivor of the named beneficiaries, were completely vested by the transfer in trust made by her on December 31, 1919.

. . . . . .

7. The provision of Article Eighth of the Sargent

Trust reading "This trust may be terminated at any time either as to the whole or as to any part of the property held in trust hereunder by the person or persons who shall then be trustees hereunder", and the accompanying provisions as to disposal of the property in case of such termination did not give to Adelaide J. Sargent any such power or control over the trustees or the property of the trust as to bring the property or the transfer of it within the provisions of subdivision (d) of Section 302 of the Revenue Act of 1926.

8. If subdivision (d) of Section 302 of the Revenue Act of 1926 can be construed as applying in terms to the Sargent Trust, the value of the property of the Sargent Trust cannot properly be included in the gross estate of Adelaide J. Sargent.

9. The effect of including the value of the property of the Sargent Trust in the decedent's gross estate as defined by Section 302 of the Revenue Act of 1926 and the imposition of an Estate Tax upon a net estate resulting from such inclusion would be to impose an excise tax upon a transfer by a statute enacted after the transfer was completed and the collection of a tax based upon such inclusion of the value of the property of the Sargent Trust in the gross estate of the decedent was a taking of property without due process of law and in violation of the provisions of the Fifth Amendment to the Constitution of the United States.

10. The Commissioner of Internal Revenue was in error in including any part of the property of the Sargent Trust in the gross estate of Adelaide J. Sargent and in imposing an estate tax upon the executors of the will of Adelaide J. Sargent and was in error in denying their application for refund of said tax together with interest thereon and the collection of said tax by the Collector of Internal Revenue was without right.

The trial was continued generally and on August 7, 1934,

during the course thereof the court denied the defendant's said request for rulings of law and his said motion for judgment and the defendant saved his exceptions. During the course of the trial the court granted all of the plaintiffs' said requests for rulings and the defendant saved his exceptions. On the same day the court handed down a written opinion in which it held that no portion of the value of the property in question was properly included in the decedent's gross estate under the provisions of Section 302 (d) of the Revenue Act of 1926.

The defendant, being aggrieved by the denial by the court of his said request for rulings of law and his said motion for judgment, and by the granting by the court of the plaintiffs' said requests for rulings of law and by the findings and rulings of the court, now excepts to said findings and rulings of the court, and therefore brings this bill of exceptions and prays that it may be allowed.

By his Attorneys,
FRANCIS J. W. FORD,
United States Attorney.
By: J. DUKE SMITH,
Special Assistant to the United States Attorney.

Assented to:
HUTCHINS & WHEELER,
EDWIN H. HOWES,
Attorneys for Plaintiffs.

Allowed Oct. 25, 1934:
ELISHA H. BREWSTER,
D. J.

From the judgment entered October 25, 1934, a petition for appeal to the United States Circuit Court of Appeals for the First Circuit was filed by the defendant on the said 25th day of October, and allowed by the court.

OPINION.

[Filed October 25, 1934.]

August 7, 1934.

BREWSTER, J. This action is brought to recover an alleged overassessment and overpayment of an estate tax assessed upon the transfer of the net estate of Adelaide J. Sargent, deceased. The controversy arises over the act of the Commissioner of Internal Revenue in including in the gross estate the value of certain property conveyed to trustees by the decedent. The case was heard upon an agreed statement of facts and evidence presented at the trial.

I find the facts to be as stipulated, and I further find from the evidence that the transfer was not made by the decedent in contemplation of death.

The pertinent facts may be stated as follows:

In 1907, the decedent conveyed certain property in trust, for the benefit of herself and her children. This trust was revoked in 1911, and another trust created which was also revoked in 1919. In both of the trust instruments the power of revocation was expressly reserved to the settlor. To take the place of the trust created in 1911, the decedent, on December 31, 1919, created the trust involved in the present suit. The purpose of this last trust was to more definitely fix the shares of the beneficiaries, to join as trustee a disinterested person with no beneficial interest, and to eliminate any reserved power of revocation so that the income would not be wholly taxed to the settlor.

The decedent, her son Arthur H. Sargent and Harry LeBaron Sampson were the trustees who joined in the declaration of trust, dated December 31, 1919, and on that date the decedent transferred to the trustees the real and personal property, the value of which the Commissioner included in the gross estate for the purpose of computing the estate tax.

At the time of this conveyance Mrs. Sargent was 83 years old, in good health and showed remarkable vigor of mind and body for one of her age. In 1920 she traveled abroad, and

it was not until 1931 that she died and this as a result of a fall. The evidence does not warrant a finding that when, in 1919, she conveyed the property in trust, she was transferring it in contemplation of death. She was merely carrying forward a plan which originated in 1907, without any thought or consciousness of impending death or of effecting a testamentary disposition of her property. The fact that upon the final distribution the property would go to her descendants after the death of the survivor of the beneficiary is not enough to justify a finding that the transfer was made in contemplation of death, within the meaning of the statute imposing estate taxes.

By the terms of the trust, the trustees were to pay one-half of the net income to the decedent during her lifetime and the other one-half to her three children until her death; then all of the income was to go to the children. Upon the death of the last survivor of the decedent and the three children who were the beneficiaries, the trust was to terminate, and the trust res was to be distributed according to the terms of the trust agreement.

The declaration of trust contained no provision by which the settlor reserved any right to alter, amend or revoke the trust, either alone or in conjunction with any other person. The instrument did contain, however, the following provision for terminating the trust:

> "EIGHTH. This trust may be terminated at any time either as to the whole or as to any part of the property held in trust hereunder, by the person or persons who shall then be trustees hereunder, such termination to be evidenced by a written declaration signed, sealed and acknowledged by them and duly recorded * * *, setting forth specifically the property as to which such termination is to take effect, and in that event the trusts declared hereunder shall as to such property be at an end and such property shall be paid over and conveyed, free and discharged of all trusts, to the said Adelaide J. Sargent,

if she be then living, and if she be not then living one share shall be paid over and conveyed to each of her children who shall then be living, * * *."

Then follow provisions for the payment of the shares to any child who was not then living.

There was a provision in the instrument that, in case of absence from the United States of any trustee thereunder, the other two trustees could exercise all the powers of the trustees and perform their duties. It appeared in the evidence that this provision was inserted because one of the trustees, Arthur H. Sargent, resided a considerable portion of his time in Paris, although at the time of the decedent's death, and for some substantial period prior thereto, he was in this country.

The trust also provided for the filling of vacancies by the remaining trustees, if any one of the trustees should die or resign.

In 1920 Mrs. Sargent resigned as trustee, and her daughter Mary Adelaide Poor was appointed by the remaining trustees to fill the vacancy. Mrs. Poor held office until November 9, 1921, when she resigned, and the decedent was duly appointed by the remaining trustees to fill the vacancy. The deceased continued to be one of the trustees until the time of her death on January 22, 1931. The other trustees, Arthur H. Sargent and Harry LeBaron Sampson, continued as trustees throughout the whole period, from the beginning of the trust until the death of Mrs. Sargent.

Parties are agreed as to the value of the property transferred by trust. It is contended that the value was properly included in the gross estate of the decedent because it fell within section 302 (c) of the Revenue Act of 1926. This section authorized the inclusion in the gross estate of a decedent of the value at the time of his death of property "To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment

at or after his death, except in case of a bona fide sale for an adequate and full consideration in money and money's worth."

I have found as a fact, and I now rule as a matter of law, that the transfer by trust was not made in contemplation of death. *United States* v. *Wells et al., Excrs.*, 283 U.S. 102. Nor can it be ruled that the transfer was one to take effect in possession or enjoyment at or after the decedent's death, in view of *Reinecke, Coll.* v. *Northern Trust Co.*, 278 U.S. 339; *May* v. *Heiner, Coll.*, 281 U.S. 238; *Burnet, Com'r* v. *Northern Trust Co.*, 283 U.S. 782; *Morsman, Admr.*, v. *Burney, Com'r*, 283 U.S. 783; *McCormick et al. Excrs.* v. *Burnet, Com'r*, 283 U.S. 784.

The reservation of a portion of the income to herself during her lifetime does not prevent the transfer from being a completed transfer and beyond the reach of the statute.

May v. *Heiner, Coll., supra.*
McCormick et al. Excrs. v. *Burnet, Com'r, supra.*
Morsman, Admr. v. *Burnet, Com'r; supra.*
Burney, Com'r v. *Northern Trust Co., supra.*

In *McCormick et al. Excrs.* v. *Burnet, Com'r, supra,* the trust contained provisions whereby the settlor could terminate the trust with the consent of one or more of the beneficiaries. This reservation was held to be insufficient to bring the transfer within the statute, and to the same effect was *Reinecke, Coll.* v. *Northern Trust Co., supra.*

The controlling question here is whether the transfer comes within the reach of 302 (d) of the Revenue Act of 1926 which required that the value of the gross estate of a decedent should be determined by including the value at the time of his death of property "(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in con-

junction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *"

The 1926 statute expressly provided that transfers that came within subdivision (d) should apply to transfers, trusts, etc., whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

If it should be held that the transfer by the decedent by trust came within the definition of 302 (d) then the further question remains, whether this statute, operating upon a transfer fully completed prior to the enactment of the statute, can be upheld as a constitutional enactment.

It is the defendant's contention, as I understand it, that the provisions of the trust indenture whereby the trustees could, at any time, terminate it, rendered the enjoyment thereof subject to change through the exercise of a power by decedent in conjunction with another to revoke the trust. This contention, in my opinion, is not sound. Whatever powers the trustees enjoyed to terminate the trust could be exercised as well after as before the death of the decedent. No power conferred upon the trustees ended upon the event of death, nor did the event bring into being, or ripen, any right or interest in survivors. There was no power of control, or power of revocation, reserved to the donor. In this respect the case is readily distinguished from *Porter* v. *Commissioner*, 288 U.S. 436, where the trust indenture contained a reservation subject to specific limitations which left the settlor "dominant in respect of other dispositions of both corpus and income." The Court further observed:

> "His death terminated that control, ended the possibility of any change by him, and was, in respect of title to the property in question, the source of valuable assurance passing from the dead to the living. That is the event on which Congress based the inclusion of property so transferred in the gross estate as a step in the calcu-

lation to ascertain the amount of what in Sec. 301 is called the net estate."

The fact that at the time of her death she was one of the trustees does not affect the legal results. She held office by virtue of an appointment by the other trustees, and not by virtue of any reservation in the trust deed. But if she had never resigned, the transfer by her would have been none the less complete because she was one of the original trustees.

Reinecke v. *Northern Trust Co., supra.*

I do not find that *Reinecke* v. *Smith,* 289 U.S. 172, cited by the defendant, lends support to his contention. In that case the indenture provided that it could be modified at any time by the donor and one of the trustees. The donor (not a beneficiary), his son (a beneficiary) and a bank with trust powers, were the trustees. The case arose under the income tax provisions of Sec. 219 (g) of the Revenue Act of 1924 (43 Stat. 253). The Court held that the income was taxable. I see nothing in that decision inconsistent with *Reinecke* v. *Northern Trust Co., supra,* or *McCormick* v. *Burnet, supra,* which held that where revocation was dependent upon joint action of grantor and the beneficiary, the transfer was effective when made and not at death. This is evident from the language of the opinion to the effect that the same considerations as to ownership and control affect the power to impose a tax on the transfer of the corpus and upon the income.

If it were necessary to hold the transfer in question as one within 302 (d), I am unable to see how one can escape the conclusion that the statute, when applied to a transfer wholly completed before the enactment of the law, would be beyond the powers of Congress.

Nichols v. *Coolidge,* 274 U.S. 531.
Reinecke v. *Northern Trust Co., supra.*
See also *Untermyer* v. *Anderson,* 276 U.S. 440.
Blodgett v. *Holden,* 275 U.S. 142.

In reaching my conclusion that the transfer here involved does not come within the sweep of 302 (d), I am following *Reinecke* v. *Northern Trust Co., supra*, in resolving doubts in favor of the taxpayer and adopting that construction which upholds the Act.

It follows that the Commissioner improperly included in the decedent's gross estate the value of the property transferred in 1919 to trustees and that plaintiff, therefore, is entitled to recover the deficiency tax of $2,533.46 unlawfully exacted, together with interest thereon.

DEFENDANT'S ASSIGNMENT OF ERRORS.

[Filed October 25, 1934.]

The defendant in this case in connection with his petition for appeal makes the following assignment of errors which he avers occurred upon the trial of the cause, to wit:

I. That the District Court erred in ruling that the plaintiffs were entitled to recover.

II. That the District Court erred in refusing to make the following rulings of law requested by the defendant:

(1) That the burden of proof is on the plaintiffs to show that the value of the property in question was improperly included in the defendant's gross estate;

(2) That the value of the property in question was properly included in the decedent's gross estate under the provisions of Sections 302 (c), (d), (h), of the Revenue Act of 1926.

III. That the District Court erred in making the following findings and rulings:

4. The conveyance in trust made by Adelaide J. Sargent on December 31, 1919, to herself, Arthur H. Sargent and Harry LeBaron Sampson, as trustees of the Sargent Trust, was a conveyance and unconditional transfer by said Adelaide J. Sargent to herself and the other two trustees of all her right, title and interest in the property of the Trust set forth in the declaration of trust dated December 31, 1919.

5. The rights of the beneficiaries of the Sargent Trust other than Adelaide J. Sargent, to one-half the net income of the trust until the death of Adelaide J. Sargent and of the whole of the net income after her death, and their rights to the corpus of the trust property after the death of the last survivor of the named beneficiaries, were completely vested by the transfer in trust made by her on December 31, 1919.

. . . . . .

7. The provision of Article Eighth of the Sargent Trust reading "This trust may be terminated at any time either as to the whole or as to any part of the property held in trust hereunder by the person or persons who shall then be trustees hereunder," and the accompanying provisions as to disposal of the property in case of such termination did not give to Adelaide J. Sargent any such power or control over the trustees or the property of the trust as to bring the property or the transfer of it within the provisions of subdivision (d) of Section 302 of the Revenue Act of 1926.

8. If subdivision (d) of Section 302 of the Revenue Act of 1926 can be construed as applying in terms to the Sargent Trust, the value of the property of the Sargent Trust cannot properly be included in the gross estate of Adelaide J. Sargent.

9. The effect of including the value of the property of the Sargent Trust in the decedent's gross estate as defined by Section 302 of the Revenue Act of 1926 and the imposition of an Estate Tax upon a net estate resulting from such inclusion would be to impose an excise tax upon a transfer by a statute enacted after the transfer was completed and the collection of a tax based upon such inclusion of the value of the property of the Sargent Trust in the gross estate of the decedent was a taking of property without due process of law and in violation of the

provisions of the Fifth Amendment to the Constitution of the United States.

10. The Commissioner of Internal Revenue was in error in including any part of the property of the Sargent Trust in the gross estate of Adelaide J. Sargent and in imposing an estate tax upon the executors of the will of Adelaide J. Sargent and was in error in denying their application for refund of said tax together with interest thereon and the collection of said tax by the Collector of Internal Revenue was without right.

IV. That the District Court erred in denying the defendant's motion for judgment.

V. That the District Court erred in ruling that no portion of the value of the property in question was properly included in the decedent's gross estate under the provisions of Section 302 (d) of the Revenue Act of 1926.

Wherefore, the defendant prays that the judgment be reversed and that the District Court be ordered to enter an order reversing the judgment of the District Court in said cause.

By his Attorneys,

FRANCIS J. W. FORD,
United States Attorney.

By: J. DUKE SMITH,
Special Assistant to the United States Attorney.

A citation on appeal was issued on October 25, 1934, being made returnable in the U. S. Circuit Court of Appeals on November 24, 1934. Service of said citation was duly acknowledged by the plaintiffs.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss.:

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, do hereby certify that the foregoing is the transcript of the record on the appeal of the defendant, including true copies of such proofs, entries and papers on file as have been agreed upon in the cause entitled,

No. 5625, Law Docket,

MARY ADELAIDE POOR and GEORGE WINTHROP SARGENT,

SURVIVING EXECUTORS OF THE WILL OF ADELAIDE J. SARGENT, DECEASED, PLAINTIFFS,

v.

THOMAS W. WHITE,

FORMER COLLECTOR OF INTERNAL REVENUE, DEFENDANT,

in said District Court determined.

And I further certify that transmitted herewith are the originals of the petition for appeal and the citation on appeal with the acknowledgment of service of citation on appeal.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, at Boston, in said District, this 24th day of November, A.D. 1934.

JAMES S. ALLEN, CLERK.

[SEAL]

PROCEEDINGS IN CIRCUIT COURT OF APPEALS

On January 8 and 9, 1935, this cause came on to be heard, and was fully heard by the court, Honorable George H. Bingham, Honorable Scott Wilson, and Honorable James M. Morton, Jr., circuit judges, sitting.

Thereafter, to wit, on the thirty-first day of January, A. D. 1935, the following opinion of the court was filed:

United States Circuit Court of Appeals for the First Circuit

October term, 1934

No. 2980

THOMAS W. WHITE, FORMER COLLECTOR, DEFENDANT, APPELLANT

v.

MARY ADELAIDE POOR ET AL., SURVIVING EXECUTORS, PLAINTIFF, appellees

Appeal from the District Court of the United States for the District of Massachusetts

Before BINGHAM, WILSON, and MORTON, JJ.

Opinion of the court

January 31, 1935

BINGHAM, *J.*: This is an appeal from a judgment of the Federal District Court for Massachusetts in an action at law brought July 10, 1933, by the executors of the will of Adelaide J. Sargent against White, former collector for the district, to recover a Federal estate tax paid by them in the amount of $2,377.89 with interest, on the ground that it was erroneously assessed and collected. The trial was had before the court, a jury having been waived in writing. The case was heard upon an agreed statement of facts and evidence presented at the trial. The court found the facts stipulated to be true and that the decedent's transfer of certain property to trustees, the value of which the Commissioner included in her gross estate, was not made by her in contemplation of death.

It appeared that on December 31, 1919, the decedent created the trust involved in this suit with a view of accomplishing three things, which she had failed to do in previous trusts she had revoked. The

first was to more definitely fix the shares of the beneficiaries; the second to join a disinterested trustee having no beneficial interest in the trust; and the third to eliminate any reserved power of revocation as to the income, believing that then the portions payable to the beneficiaries, other than herself, could not be taxed to her. The original trustees were the decedent, her son, Arthur H. Sargent (a beneficiary under the trust), and Harry Le Baron Sampson, a disinterested person without beneficial interest; and on December 31, 1919, the decedent transferred to the trustees the real and personal property, the value of which the Commissioner included in the gross estate.

By the terms of the trust the trustees were to pay one-half of the net income to the decedent during her life and the other half to her three children, and, on her death, pay all the income to the children. The trust was to terminate upon the death of the last surviving beneficiary and the corpus of the trust was then to be distributed according to the terms of the trust. The trust instrument contained the following provision for an earlier termination of the trust:

"Eighth. This trust may be terminated at any time either as to the whole or as to any part of the property held in trust hereunder, by the person or persons who shall then be trustees hereunder, such termination to be evidenced by a written declaration signed, sealed, and acknowledged *by them* and duly recorded in the Registry of Deeds for the County of Suffolk, setting forth specifically the property as to which such termination is to take effect, and in that event the trusts declared hereunder shall as to such property be at an end and such property shall be paid over and conveyed, free and discharged of all trusts, to the said Adelaide J. Sargent, if she be then living, . . ." (Italics supplied.)

Then follow provisions for the payment of any shares to her children if she be not then living.

There was a provision in the instrument that, in case of the absence from the United States of any trustee hereunder, the other two trustees could exercise all the powers of the three trustees and perform all their duties. Arthur H. Sargent, one of the trustees, resided a considerable portion of the time in Paris, but at the time of the decedent's death and for some substantial period prior thereto he was in this country. There was also a provision for filling vacancies by the remaining trustees in case one should die or resign. In 1920 Mrs. Sargent resigned as trustee and her daughter, Mary Adelaide Poor, was appointed to fill the vacancy. She held office until November 1, 1921, when she resigned and the decedent was reappointed. Thereafter she continued as trustee until her death, January 3, 1931. The other two trustees served from the beginning of the trust until after the death of Mrs. Sargent.

There is no dispute as to the value of the property transferred in trust. The only question before us on this appeal is whether the transfer comes within the provisions of section 302 (d) of the Revenue Act of 1926. Section 302 (d) of that act provides:

"SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * * *

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, . . ."

It was also provided in the act of 1926 that subdivision (d) of section 302 should apply to transfers in trust, etc., whether made, created, arising, or existing before or after the enactment of the act.

The District Court, in construing the eighth provision of the trust, ruled, as a matter of law, that, although the decedent, as trustee, had, at the date of her death, in conjunction with the other trustees, power to terminate the trust estate, as donor or settlor she had no power, under the provisions of the trust, to revoke the trust, and that consequently the provisions of section 302 (d) did not apply. The court apparently indulged in the thought that, as those constituting the body of trustees after Mrs. Sargent's death could terminate the trust, should it then exist, and the power did not end with her death, her inclusion in the board of trustees, prior to and at the time of her death, relieved her of having a power which she as settlor could exercise in conjunction with others within the meaning of section 302 (d).

The decedent, prior to and at the time of her death, under the provisions of the eighth article of the trust, apparently had power that she might have exercised in conjunction with others to terminate the trust within the language of section 302 (d), whether you call her a settlor or trustee, both of which she was. To hold otherwise would be to disregard substance for form. Section 302 (d) is not limited to cases where the decedent has power to revest title to the corpus of the trust in himself. The case of *Porter* v. *Commissioner*, 288 U. S. 436, puts that question to rest. Neither is there an express qualification in that section requiring that the power reserved shall be exercisable by the decedent alone or in conjunction with one not having an adverse interest. The language of the statute is "alone or in conjunction with any person." But if decedent's power to revoke under that section can be exercised only alone or in conjunction with a person not having a beneficial adverse interest, it would seem that Congress intended that the words "any person" should mean any person not having such interest. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 344, 346.

The Reinecke case involved the assessment and collection of an estate tax upon the estate of the trust company's testator under the Revenue Act of 1921, c. 136, s. 402 (c) (42 Stat. 227). There were seven trusts involved. With two we are not concerned. The remaining five trusts were created in 1918, before the passage of

the Revenue Act of 1921, but after the enactment of similar provisions of the estate tax in the Revenue Act of 1918. "With respect to each of these five trusts a power was also reserved 'to alter, change, or modify the trust', which was to be exercised in the case of four of them by the settlor and the single beneficiary of each trust, acting jointly, and in the case of one of the trusts by the settlor and a majority of the beneficiaries named, acting jointly. The settlor died . . . with the beneficiaries and life tenants designated in the trusts surviving him, and without having modified any of the five trusts except one, and that in a manner not now material. The commissioner, in fixing the amount of the estate for tax purposes included the corpus of all seven trusts. . . ."

By section 302 it was provided that in calculating the tax there shall be included in the gross estate all property, tangible and intangible, "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, . . . intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this act) . . ."

In passing upon the question of the liability of the estate of the decedent to be taxed upon the corpus of the five trusts due to the power reserved in the trust instrument "to alter, change, or modify the trust", the court said, at page 346:

"If it be assumed that the power to modify the trust was broad enough to authorize disposition of the trust property among new beneficiaries or to revoke the trusts, still it was not one vested in the settlor alone, as were the reserved powers in the case of the two trusts. He could not effect any change in the beneficial interest in the trusts without the consent in the case of four of the trusts of the person entitled to that interest, and in the case of one trust without the consent of a majority of those so entitled. Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust [property], for all practically purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute."

And having reached the conclusion that the transfers were complete at the date of the execution of the trusts because the power to revoke or alter in five of the trusts was dependent upon the consent of at least one person having a beneficial and consequently adverse interest, the Supreme Court held the corpus of the five trusts was not taxable to the estate, and affirmed the judgment of the court below in favor of the executor.

The beneficial adverse interest of Arthur H. Sargent was substantial and this being so we are not called upon to determine whether an interest of a lesser character would answer the requirement.

The decedent could not have revoked or terminated the trust without the consent of the other two trustees. A termination of the trust required joint action on the part of the trustees. At the time of Mrs. Sargent's death, and for some time prior thereto, all three

trustees were in this country and had the decedent desired to revoke or terminate the trust, she would have needed to obtain the consent of Arthur H. Sargent as well as that of Sampson. See *Reinecke* v. *Smith*, 289 U. S. 172, 178.

In view of the decision in *Reinecke* v. *Northern Trust Company*, we are of the opinion that the decedent before and at the time of her death had no power by which she could effect a change of interests in the trust, and consequently that the corpus of the trust was completely transferred to the trustees at the date of the execution of the trust instrument, for whatever power was reserved to her could only be exercised in conjunction with one having a beneficial adverse interest. If A gives property to B, reserving to himself the right to revoke the same only upon B's consent, the transfer is complete, the reservation is nil, and whether A gets the property back or not lies wholly with B. If a transfer back is made with B's consent, it would be a gift back and not a revocation. This is in substance the situation here.

For the reasons here stated the order is:

The judgment of the District Court is affirmed.

On the same day, to wit, January 31, 1935, the following judgment was entered:

Judgment

January 31, 1935

This cause came on to be heard January 8 and 9, 1935, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now, to wit, January 31, 1935, here ordered, adjudged, and decreed as follows: The judgment of the District Court is affirmed.

By the court:

ARTHUR I. CHARRON, *Clerk.*

Thereafter, to wit, on March 4, 1935, mandate issued to the District Court.

Clerk's certificate

I, Arthur I. Charron, clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the foregoing pages, numbered 1 to 61, inclusive, contain and are a true copy of the record and all proceedings to and including April 20, 1935, in the cause in said court numbered and entitled "No. 2980, Thomas W. White, Former Collector of Internal Revenue, defendant, appellant, v. Mary Adelaide Poor et al., Surviving Executors, plaintiffs, appellees."

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this twentieth day of April, A. D. 1935.

[SEAL] ARTHUR I. CHARRON, *Clerk.*

U. S. GOVERNMENT PRINTING OFFICE: 1935

Order allowing certiorari

Filed May 20, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted, and the case is assigned for argument immediately following No. 827, Helvering, Commissioner of Internal Revenue, vs. Helmholz, as Sole Devisee, etc.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.